Kerajaan Malaysia v Nooryana Najwa bt Dato Sri Mohd Najib

HIGH COURT (SHAH ALAM) — WRIT NO BA-21NCVC-43–07 OF 2019
FAIZAH JAMALUDIN J
26 AUGUST 2020

Civil Procedure — Stay of proceedings — Application for — Pending appeal — Whether there were special circumstances justifying stay of proceedings — Whether s 106(3) of the ITA unconstitutional and/or ultra vires Federal Constitution — Income Tax Act 1967 s 106(3)

Civil Procedure — Summary judgment — Application for — Plaintiff brought action against defendant for tax due and payable — Plaintiff applied for summary judgment — Whether application for summary judgment ought to be allowed — Rules of Court 2012 O 14 r 1

This was an application by the Government of Malaysia for summary judgment under O 14 r 1 of the Rules of Court 2012 for its claim against the defendant for tax due and payable for the years of assessment 2011, 2012, 2013, 2014, 2015, 2016 and 2017 ('YAs 2011 to 2017'). The plaintiff had filed a civil suit against the defendant for recovery of the sum of RM10,335,292.36 being income tax assessed against the defendant for YAs 2011 to 2017 including penalties and increases under the Income Tax Act 1967 ('the ITA'). The suit and this application for summary judgment was filed by the Inland Revenue Board of Malaysia ('IRB') on the plaintiff's behalf. The defendant filed an application in encl 15 for a stay of these proceedings pending the disposal of her appeal against the tax assessments. Her grounds were: (a) there were special circumstances as to why a stay of proceedings should be granted; (b) success in her appeal against the tax assessments for the said YAs would be rendered nugatory because she would not be restored in her original position, and judgment, if entered against her, would cause her irreparable financial damage; and (c) the ITA did not have any provision curtailing or restricting the inherent jurisdiction to stay the proceedings in this suit. The defendant submitted that the judicial powers vested in this court by virtue of art 121 of the Federal Constitution supersedes s 106(3) of the ITA. The defendant also filed an application in encl 53 for this court to refer and transmit this suit to the Federal Court for the determination of the constitutional questions posed by the defendant and for the proceedings of this suit be stayed pending the determination of the constitutional questions by the Federal Court.

Held:

(1) There were no special circumstances to merit a stay of these proceedings. The success of the defendant's appeal against the tax assessment would not be rendered nugatory if judgment was entered against her in this suit. It could not be said that the Government of Malaysia was not in the financial position to return to the defendant any amount of tax held to be incorrectly assessed and collected from her. For these reasons, the defendant's application for a stay of proceedings in encl 15 was dismissed (see paras 20–22).

(2) The defendant's application in encl 53 was dismissed. To stay these proceedings pending the determination of the Federal Court on the constitutionality of s 106(3) of the ITA, vis a vis the judicial powers of the courts under art 121 of the Federal Constitution, would open the flood-gates for all other defendants, facing similar civil suits by the plaintiff under s 106 of the ITA for recovery of unpaid taxes, to use the same grounds of reference to the Federal Court on the constitutionality of s 106(3) of the ITA as a basis to stay the civil suits against them. The judicial powers of the courts under art 121 of the Federal Constitution was not usurped by reason of s 106(3) of the ITA and by the Special Commissioners of Income Tax performing these judicial or quasi-judicial functions of hearing the appeals by tax payers against assessments or additional assessments pursuant to s 99 of the ITA (see paras 25 & 27).

(3) Since the certificate under s 142 of the ITA was not signed by the Director General of Inland Revenue ('DGIR') and there was no evidence that the person who signed it was either an officer *gazetted* to exercise any function of the DGIR under the ITA pursuant to s 136(2) of the ITA, or was authorised by the DGIR 'in writing under his hand' pursuant to s 136(5) of the ITA to exercise or assist in exercising any function of the DGIR, the certificate was not sufficient evidence of the amount tax due and payable by the defendant. It was also not sufficient authority for the court to give judgment for the amount stated on the certificate. By stating that the defendant had no defence with merits, the plaintiff was raising triable issues which the court was not allowed to consider under O 14 and which did not apply to summary judgment applications by the government for claims of tax due by virtue of s 106(3) of the ITA. Moreover, the deponent's failure to aver her belief that the defendant had no defence to the plaintiff's claim rendered the affidavit defective since it was contrary to the express requirements of O 14 r 2 and O 73 r 5(2). Therefore, the plaintiff's application for summary judgment for its claim against the defendant for tax due and payable for YAs 2011 to 2017 was dismissed (see paras 52, 61–62 & 64).

[Bahasa Malaysia summary

Ini adalah permohonan oleh Kerajaan Malaysia untuk penghakiman terus berdasarkan A 14 k 1 Kaedah-Kaedah Mahkamah 2012 atas tuntutannya terhadap defendan atas cukai yang terhutang dan perlu dibayar untuk tahun taksiran 2011, 2012, 2013, 2014, 2015, 2016 dan 2017 ('YAs 2011 hingga 2017'). Plaintif telah mengemukakan saman sivil terhadap defendan untuk mendapatkan pengembalian sejumlah RM10,335,292.36 sebagai cukai pendapatan yang dinilai terhadap defendan untuk YAs 2011 hingga 2017 termasuk penalti dan kenaikan di bawah Akta Cukai Pendapatan 1967 ('Akta'). Saman dan permohonan ini untuk penghakiman terus difailkan oleh Lembaga Hasil Dalam Negeri Malaysia ('LHDN') bagi pihak plaintif. Defendan memfailkan permohonan melalui lampiran 15 untuk penangguhan prosiding sementara menunggu keputusan rayuannya terhadap penilaian cukai. Alasannya adalah: (a) terdapat keadaan istimewa mengapa penangguhan prosiding harus diberikan; (b) keberhasilan dalam rayuannya terhadap taksiran cukai untuk YAs tersebut akan dianggap sia-sia kerana dia tidak akan dipulihkan pada kedudukan asalnya, dan penghakiman, jika dibuat terhadapnya, akan menyebabkan kerugian kewangannya yang tidak dapat diperbaiki; dan (c) Akta tidak mempunyai peruntukan yang mengekang atau menyekat bidang kuasa mahkamah untuk menangguhkan prosiding dalam tuntutan ini. Defendan menyatakan bahawa kuasa kehakiman yang diberikan di mahkamah ini berdasarkan perkara 121 Perlembagaan Persekutuan menggantikan s 106(3) Akta. Defendan juga memfailkan permohonan melalui lampiran 53 agar mahkamah ini merujuk dan memindahkan tuntutan ini ke Mahkamah Persekutuan untuk penentuan persoalan-persoalan perlembagaan yang diajukan oleh defendan dan agar proses tuntutan ini ditangguhkan sementara menunggu penentuan pertanyaan-pertanyaan perlembagaan oleh Mahkamah Persekutuan.

Diputuskan:

(1) Tidak ada keadaan istimewa yang layak untuk menangguhkan prosiding ini. Kejayaan rayuan defendan terhadap taksiran cukai tidak akan menjadi sia-sia jika keputusan dibuat terhadapnya dalam tuntutan ini. Tidak dapat dikatakan bahawa Kerajaan Malaysia tidak berada dalam kedudukan kewangan untuk mengembalikan kepada defendan apa-apa jumlah cukai yang dipegang untuk dinilai dan dipungut secara salah daripadanya. Atas sebab-sebab ini, permohonan defendan untuk menangguhkan prosiding melalui lampiran 15 ditolak (lihat perenggan 20–22).

(2) Permohonan defendan dalam lampiran 53 ditolak. Untuk menangguhkan prosiding ini sementara menunggu keputusan Mahkamah Persekutuan mengenai keperlembagaan s 106(3) Akta, mengenai kuasa kehakiman mahkamah di bawah perkara 121

Perlembagaan Persekutuan, akan membuka pintu untuk semua defendan lain, yang menghadapi tuntutan sivil yang serupa oleh plaintif di bawah s 106 Akta untuk mendapatkan cukai yang belum dibayar, untuk menggunakan alasan rujukan yang sama kepada Mahkamah Persekutuan mengenai keperlembagaan s 106(3) Akta sebagai asas penangguhan tuntutan sivil terhadap mereka. Kuasa kehakiman mahkamah berdasarkan perkara 121 Perlembagaan Persekutuan tidak dirampas oleh s 106(3) Akta dan oleh Pesuruhjaya Khas Cukai Pendapatan yang melaksanakan fungsi kehakiman atau separa kehakiman untuk mendengar rayuan oleh pembayar cukai terhadap penilaian atau penilaian tambahan menurut s 99 Akta (lihat perenggan 25 & 27).

(3) Oleh kerana perakuan di bawah s 142 Akta tidak ditandatangani oleh Ketua Pengarah Hasil Dalam Negeri ('DGIR') dan tidak ada bukti bahawa orang yang menandatanganinya adalah pegawai yang diwartakan untuk menjalankan fungsi DGIR di bawah Akta menurut s 136(2) Akta, atau diizinkan oleh DGIR 'in writing under his hand' menurut s 136(5) Akta untuk menjalankan atau membantu menjalankan fungsi DGIR, perakuan bukan bukti yang mencukupi mengenai jumlah cukai yang terhutang dan perlu dibayar oleh defendan. Adalah tidak mencukupi juga untuk memberikan penghakiman untuk jumlah yang dinyatakan dalam perakuan. Dengan menyatakan bahawa defendan tidak memiliki pembelaan bermerit, plaintif membangkitkan isu untuk dibicarakan di mana mahkamah tidak dibenarkan untuk mempertimbangkannya di bawah A 14 dan yang tidak berlaku untuk permohonan penghakiman terus oleh kerajaan untuk tuntutan cukai yang terhutang oleh s 106(3) Akta. Tambahan lagi, kegagalan deponen untuk menegaskan kepercayaannya bahawa defendan tidak mempunyai pembelaan terhadap tuntutan plaintif menjadikan afidavit itu cacat kerana ia bertentangan dengan kehendak yang jelas dari A 14 k 2 dan A 73 k 5(2). Oleh itu, permohonan plaintif untuk penghakiman terus atas tuntutannya terhadap defendan atas cukai yang terhutang dan perlu dibayar untuk YAs 2011 hingga 2017 telah ditolak (lihat perenggan 52, 61–62 & 64).]

Cases referred to

Aeon Credit Services (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (Case No WA-25–326–12 of 2017) (unreported), HC (refd)

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400; [1992] 1 CLJ Rep 14, SC (refd)

Chong Woo Yit v Government Of Malaysia [1989] 1 MLJ 473; [1989] 1 CLJ Rep 9; [1989] 2 CLJ 87, SC (refd)

Diana Clarice Chan Chiing Hwa v Tiong Chiong Hoo [2002] 2 MLJ 97; [2002] 1 CLJ 721; [2002] 2 AMR 1527, CA (refd)

ES HVAC Sdn Bhd v Miracle Asset Builder Sdn Bhd [2019] 3 MLJ 485; [2019] 1 LNS 209, CA (refd)
Eng Mee Yong & Ors v Letchumanan [1979] 2 MLJ 212, PC (refd)
Government of Malaysia v Abdul Rahman [1975] 1 MLJ 276 (refd)
Government of Malaysia v Mohd Najib bin Haji Abd Razak [2020] MLJU 1043; [2020] 1 LNS 754, HC (refd)
Kerajaan Malaysia v Dato' Hj Ghani Gilong [1995] 2 MLJ 119; [1995] 3 CLJ 161 (refd)
Kerajaan Malaysia v Neraca Untung Sdn Bhd [2009] MLJU 521; [2009] 1 LNS 575, CA (refd)
Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd [2002] 3 MLJ 49; [2002] 3 CLJ 380, CA (refd)
Mass Rapid Transit Corporation Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (Civil Appeal No W-01(A)-684–12 of 2018), CA (refd)
National Company For Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300; [1984] 1 CLJ Rep 283; [1984] 2 CLJ 200, FC (refd)
PP v Dato' Yap Peng [1987] 2 MLJ 311, SC (refd)
Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case [2017] 3 MLJ 561; [2017] 5 CLJ 526; [2017] 4 AMR 123, FC (refd)
Sumur Heights Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri dan satu lagi permohonan [2019] MLJU 1039, HC (refd)
Sun Man Tobacco Co Ltd v Government of Malaysia [1973] 2 MLJ 163, FC (refd)
Tay Bok Choon v Tahansan Sdn Bhd [1987] 1 MLJ 433; [1987] 1 WLR 413, PC (refd)
Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v Raja Zainal Abidin bin Raja Hussin & Anor [1995] 3 MLJ 224; [1996] 2 CLJ 353, HC (refd)

Legislation referred to

Federal Constitution art 121
Finance Act 2019 s 17
Government Proceedings Act 1956 s 19(1)
Income Tax Act 1967 ss 77, 78, 79, 90(3), 99, 100(2)(a), 103, 106, 106(1), (3), 112(3), 134(2)(b), (2)(c), 136, 136(2), (5), 142, 142(1), (2), 152
Inland Revenue Board of Malaysia Act 1995 s 10(a)
Interpretation Acts 1948 and 1967 s 7
Rules of Court 2012 O 14, O 14 rr 1, 2, 3, O 73 r 5(2), O 92 r 4

Norhisham Ahmad (Al-Hummidallah Idrus with him) (Senior Revenue Counsel, Inland Revenue Board of Malaysia) for the plaintiff.
Muhammad Farhan Shafee (Wee Yeong Kang with him) (Shafee & Co) for the

defendant.

Faizah Jamaludin J:

A. INTRODUCTION

[1] This is an application by the Government of Malaysia for summary judgment under O 14 r 1 of the Rules of Court 2012 ('the ROC') for its claim against the defendant, Nooryana Najwa bt Mohd Najib, for tax due and payable for the years of assessment 2011, 2012, 2013, 2014, 2015, 2016 and 2017 ('YAs 2011 to 2017').

[2] The plaintiff had filed a civil suit against the defendant for recovery of the sum of RM10,335,292.36 being income tax assessed against the defendant for YAs 2011 to 2017 including penalties and increases under the Income Tax Act 1967 (Act 53) ('the ITA'). The suit and this application for summary judgment was filed by the Inland Revenue Board of Malaysia ('IRB') on the plaintiff's behalf, pursuant to the IRB's function under s 10(a) of the Inland Revenue Board of Malaysia Act 1995 (Act 533) ('the IRB Act').

B. BACKGROUND FACTS

[3] The defendant did not file her tax returns for any of the said YAs within the time stipulated in s 77 of the ITA. The Director General of Inland Revenue ('DGIR') through Notices of Assessment (Form J) dated 15 March 2019 raised assessments for each of the said YAs under sub-s 90(3) of the ITA together with penalties under sub-s 112(3) of the ITA for the tax payable for each YA.

[4] The amount of tax assessed by the DGIR under sub-s 90(3) of the ITA and the penalty charged under sub-s 112(3) of the ITA for non-payment of tax for each of the YAs are detailed the table below:

YA	Tax Assessed (RM)	Penalty (RM)	Total Tax Payable (RM)
2011	1,676,341.20	754,353.54	2,430,294.74
2012	18,353.96	8,259.28	26,613.24
2013	4,146,177.68	1,865,779.96	6,011,957.64
2014	187,470.98	84,361.94	271,832.92
2015	33,466.88	15,060.10	48,526.98
2016	94,893.25	42,701.96	137,595.21
2017	14,540.96	6,543.43	21,084.39
TOTAL			8,948,305.12

[5] The Forms J for each of the said YAs were served personally on the defendant's tax agent at the IRB's office in Kuala Lumpur on 18 March 2019.

[6] As the defendant did not pay the tax assessed for YAs 2011 to 2017 by the due date after the service of the notices of assessment, the amount of tax payable for the said YAs was increased by a sum equal to ten percent (10%) of the amount unpaid pursuant to s 103 of the ITA. The amount of tax was increased by a further five percent because the defendant continued to fail to pay the outstanding amount of tax assessed plus the 10% increase within 60 days from the due date. Accordingly, with the 10% and 5% increases, the total amount of tax due and payable by the defendant to the plaintiff is RM10,335,292.36. The breakdown of the tax due and payable by the defendant to the plaintiff is as detailed in the table below:

YA	Tax Payable (RM)	10% (RM)	5% (RM)	Total (RM)
2011	2,430,294.74	243,069.47	133,688.21	2,807,452.42
2012	26,613.24	2,661.32	1,463.72	30,738.28
2013	6,011,957.64	601,195.76	330,657.67	6,943,811.07
2014	271,832.92	27,183.29	14,950.81	313,967.02
2015	48,526.98	4,852.69	2,668.98	56,048.65
2016	137,595.21	13,759.52	7,567.73	158,922.46
2017	21,084.39	2,108.43	1,159.64	24,352.46
TOTAL				10,335,292.36

[7] The defendant first filed an appeal against the assessments through Forms Q dated 5 April 2019 for each of the said YAs. The Forms Q were to the IRB under the cover of letters dated 12 April 2019 by her solicitors, Messrs Shafee & Co. However, the Forms Q were not in accordance with the format stipulated in ss 99 and 152 of the ITA. By a letter dated 16 April 2019, the IRB advised the defendant that the Forms Q must comply with the requisite statutory provisions to avoid her appeal from being rejected and that she may seek for an extension of time to file her appeal through Form N. The defendant then applied for an extension of time to file her appeal for the taxes assessed for YAs 2011 to 2017 through Forms N, all dated 3 May 2019.

[8] The DGIR approved her application and granted her an extension of time up to 26 July 2019 to file her appeal under sub-s 100(2)(a) of the ITA. The defendant filed her appeals again through Forms Q dated 18 July 2019 for YAs 2011 to 2017. On 7 August 2019, the defendant filed Form CP102 (statement of personal and private expenses) for YAs 2011 to 2017 and Form CP103 (capital statement) for YAs 2010 to 2017.

[9] On 24 July 2019, the IRB on behalf of the plaintiff filed this writ action

for recovery of the sum of RM10,335,292.36, being the total amount of tax due and payable by the defendant for the YAs 2011 to 2017.

[10] The 20 November 2019, the IRB on behalf of the plaintiff filed the application in encl 8 to enter summary judgment against the defendant for its claim.

[11] The chronology of events in this case is set-out in the table below:

Date	Events
13 September 2018	The IRB issued a notice under ss 78 and 79 of the ITA requesting the defendant to submit all her tax returns for YAs 2011 to 2017 and Forms CP102 and 103.
15 March 2019	The DGIR through Notices of Assessment (Form J) raised assessments for YAs 2011 to 2017 under sub-s 90(3) of the ITA and penalties under sub-s 112(3) of ITA.
10 March 2019	The Forms J were served personally on the defendant's tax agent.
12 April 2019	defendant filed her appeals through Forms Q dated 5 April 2019.
16 April 2019	The IRB informed the defendant that her Forms Q were incorrect and advised her to apply for an extension of time to file her appeals again.
3 May 2019	The defendant filed her application in Form N for an extension of time for her to file her appeal for YAs 2011 to 2017.
26 June 2019	The DGIR through Forms CP.15A granted the defendant to file an extension time until 26 July 2019 for her file her appeals against the assessments.
18 July 2019	The defendant filed the Form Qs for her appeal against the assessments for YAs 2011 to 2017.
24 July 2019	The IRB on behalf of the government files the writ action in the Shah Alam High Court for recovery of the tax due and payable by the defendant under the Forms J.
26 July 2019	Last day of extension of time granted by the DGIR for defendant to file her appeals.
7 August 2019	The defendant filed Form CP102 (statement of personal and private expenses) for YAs 2011 to 2017 and Form CP103 (capital statement) for YAs 2010 to 2017.
20 November 2019	The IRB on behalf of the plaintiff filed the application for summary judgment in encl 8

C. THE DEFENDANT'S CASE AND STAY APPLICATIONS (ENCLS 15 AND 53)

[12] The defendant claims that the tax assessments for the said YAs were made without any basis and/or are grossly inaccurate. She also contends that the tax assessments for YA 2011 and 2013 are time-barred. She avers that the actual tax due, if any, from her is in the range of RM167,943. She argues that these are triable issues that render an order for summary judgment unsuitable.

[13] On 3 January 2020, the defendant filed an application in encl 15 for a stay of these proceedings pending the disposal of her appeal against the tax assessments. Her grounds for a stay of these proceedings are: (i) there are special circumstances as to why a stay of proceedings should be granted; (ii) success in her appeal against the tax assessments for the said YAs would be rendered nugatory because she would not be restored in her original position, and judgment, if entered against her, would cause her irreparable financial damage; and (iii) ITA does not have any provision curtailing or restricting the inherent jurisdiction to stay the proceedings in this suit.

[14] Learned counsel for the defendant, submits that the judicial powers vested in this court by virtue of art 121 of the Federal Constitution supersedes s 106(3) of the ITA. He also argues that s 106(3) of the ITA does not restrict this court's powers to make an independent judgment of the validity of the sums claimed as the courts possess the inherent jurisdiction to set aside the plaintiff's application for summary judgment to prevent injustice.

(i) Are there special circumstances justifying the stay of these proceedings?

[15] The question before this court is whether the defendant's appeal to the Special Commissioners for income tax against the notices of assessments and the fact that the tax payable involves a large sum of money are special circumstances that merit this court to exercise its inherent powers under O 92 r 4 of the ROC to order a stay of proceedings in this suit.

[16] In *Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v Raja Zainal Abidin bin Raja Hussin & Anor* [1995] 3 MLJ 224; [1996] 2 CLJ 353, Abdul Malik Ishak J held that a substantial amount of money in a claim does not amount to 'special circumstances'. *Wu Shu Chen* was referred to with approval by the Court of Appeal in *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49; [2002] 3 CLJ 380 and by the High Court in *Aeon Credit Services (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (Case No WA-25–326–12 of 2017) (unreported).

[17] In *Ming Ann Holdings*, Abdul Hamid Mohamad JCA (as he then was) in

delivering the judgment of the Court of Appeal referred with approval to the High Court's decision in *Wu Shu Chen* that 'an appeal to the Court of Appeal and the fact that a large amount of money is involved do not constitute special circumstances'. The High Court in *Aeon Credit Services* held that just because the claim by the IRB involves a large sum of money; it does not amount to special circumstances. This decision was affirmed by the Court of Appeal.

[18] In line with the decisions in *Wu Shu Chen*, *Ming Ann Holdings* and *Aeon Credit Services*, the High Court in *Sumur Heights Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri dan satu lagi permohonan* [2019] MLJU 1039 held that 'the amount involved (in a dispute relating to the payment of tax) is immaterial as the payment made is refundable in the event that the applicant succeeds in quashing the said notice of assessment'.

[19] In the recent case of *Government of Malaysia v Mohd Najib bin Haji Abd Razak* [2020] MLJU 1043; [2020] 1 LNS 754, the High Court held the fact that defendant had to pay tax due and payable for the YAs 2011 to 2017 in the sum of RM1.69 billion did not amount to special circumstances that merited the Court to stay the proceedings in that case.

[20] Based on these decisions, particularly those the Court of Appeal in *Ming Ann Holdings* and those of the High Court that have been affirmed by the Court of Appeal, I found there were no special circumstances to merit a stay of these proceedings. The defendant must pay the plaintiff the sum of RM10,335,292.36 in outstanding tax for the YAs 2011 to 2017, including the increases imposed pursuant to s 103 of the ITA, pending the disposal of her appeal to the Special Commissioners of Income Tax.

[21] I also found that the success of the defendant's appeal against the tax assessment would not be rendered nugatory if judgment was entered against her in this suit. Upon the final disposal of her appeal against the tax assessments, if it is held that the tax payable for the YAs 2011 to 2017 was excessive, incorrectly assessed and/or incorrectly increased, the plaintiff is legally obliged to return the amount of tax incorrectly collected from the defendant. It cannot be said that the Government of Malaysia is not in the financial position to return to the defendant any amount of tax held to be incorrectly assessed and collected from her. The Court of Appeal in the case of *Mass Rapid Transit Corporation Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (Civil Appeal No W-01(A)-684–12 of 2018) affirmed the decision of the High Court in dismissing the application for stay on the grounds that there is no issue that the appeal before the Special Commissioners of Income Tax being rendered nugatory since the tax collected can be refunded by the DGIR.

[22] For these reasons, I dismissed the defendant's application for a stay of proceedings in encl 15.

[23] On the eve of the hearing of the defendant's application for stay of proceedings in encl 15 and the plaintiff's application for summary judgment in encl 8, the defendant filed an application in encl 53 for this court to refer and transmit this suit to the Federal Court for the determination of the constitutional questions posed by the defendant and for the proceedings of this suit be stayed pending the determination of the constitutional questions by the Federal Court.

[24] The question for reference to the Federal Court in encl 53 is essentially whether s 106(3) of the ITA is unconstitutional and/or ultra vires the Federal Constitution. Learned counsel for the defendant, in a 180-degree turn from his position in encl 8 — where he contends that this court's judicial powers under art 121 of the Federal Constitution supersedes s 106(3) of the ITA — avers in his affidavit in support of encl 53 that this court's judicial powers under art 121 of the Federal Constitution has been usurped by s 106 of the ITA since the net effect of s 106(3) of the ITA is that this court 'has no choice but simply to validate or anoint the assessment raised by the Respondent without any means of considering if the assessment if justified or not'. He says as there has been no appellate decision on ITA's applicability with art 121 of the Federal Constitution before or after the decision in *Public Prosecutor v Dato' Yap Peng* and *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561; [2017] 5 CLJ 526; [2017] 4 AMR 123, a proper and detailed judicial consideration should be taken by the Federal Court.

[25] I dismissed the defendant's application in encl 53. My reason for dismissing the application is that to stay these proceedings pending the determination of the Federal Court on the constitutionality of s 106(3) of the ITA, vis a vis the judicial powers of the courts under art 121 of the Federal Constitution, would open the flood-gates for all other defendants, facing similar civil suits by the plaintiff under s 106 of the ITA for recovery of unpaid taxes, to use the same grounds of reference to the Federal Court on the constitutionality of s 106(3) of the ITA as a basis to stay the civil suits against them. For the same reason, Malaysian tax payers may choose not to pay their taxes pending the decision of the Federal Court on the constitutionality of s 106(3) of the ITA since all civil proceedings for recovery of unpaid taxes by the Government are to be stayed pending the determination by the Federal Court. Taxes is one of the main sources of income for the Government of Malaysia. Non-payment of taxes by taxpayers pending the determination by the Federal Court of the constitutionality of s 106(3) of the ITA would place our public-sector under more strain than it already is.

[26] Moreover, in the case of *Semenyih Jaya*, Zainun Ali FCJ explained that because of the exigencies of judicial function, the Special Commissioners of Income Tax as well as other inferior tribunals, perform a function which is judicial or quasi-judicial in nature. The Special Commissioners of Income Tax are lay persons who use their specialist skills to adjudicate on issues which come before them and 'their adjudicative powers are confined to their relative spheres'. Her Ladyship's explanation in para 53 of the judgment is reproduced below:

> [53] Before discussing the dialectics of judicial power, a brief outline on the exigencies of judicial function would be helpful. Other than the civil courts, bodies such as the Industrial Court, the Special Commissioner of Income Tax, as well as other inferior tribunals, perform a function which is judicial or quasi-judicial in nature. They can grant orders such as certiorari, mandamus etc. Thus, it is recognised that judicial functions (as opposed to judicial powers) are not the monopoly of the Judiciary. These inferior tribunals are necessary and they exist to lend weight to their specialist skills in issues which come up before them. The adjudicators of these inferior tribunals are, for the most part, lay persons and so their adjudicative powers are confined to their relevant spheres.

[27] Therefore, I am unable to agree with learned counsel for the defendant that the judicial powers of the courts under art 121 of the Federal Constitution is usurped by reason of s 106(3) of the ITA and by the Special Commissioners of Income Tax performing these judicial or quasi-judicial functions of hearing the appeals by tax payers against assessments or additional assessments pursuant to s 99 of the ITA.

D. THE PLAINTIFF'S APPLICATION FOR SUMMARY JUDGMENT (ENCL 8)

(i) Government's application for summary judgment is subject to and in accordance with the Rules of Court

[28] The government may apply to the High Court for summary application in certain revenue matters pursuant to s 19(1) of the Government Proceedings Act 1956 (Revised 1988) ('the GPA'). Section 19(1) of the GPA states that the Government's application for summary judgment is made subject to and in accordance with the rules of court. Section 19(1) of the GPA reads as follows:

> 19 Summary Application to the High Court in certain revenue matters
>
> (1) Subject to and in accordance with rules of court, the Government may apply in a summary manner to the High Court for the payment of any duty, penalty or other sum payable under the written law, or for the delivery of any accounts required to be delivered, or the furnishing of any information required to be furnished, by any written law.

[29] The rules of court that governs applications for summary judgments is

O 14 r 1 of the Rules of Court 2012 ('the ROC'). Order 14 r 1 reads as follows:

> 1 Application by plaintiff for summary judgment (O 14 r 1)
>
> (1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, *the plaintiff may*, *on the ground that the defendant has no defence to a claim included in the writ*, or to a particular part of such a claim, or has no defence to such a claim or part thereof except as to the amount of any damages claimed, *apply to the Court for judgment against that defendant*. (Emphasis added.)

[30] Pursuant to O 14 r 2 of the ROC, an application for summary judgment must be supported by an affidavit, verifying the facts on which the claim is based; and stating the deponent's belief there is no defence to the claim. Order 14 r 2 reads as follows:

> 2 Manner in which application under rule 1 shall be made (O 14 r 2)
>
> (1) An application under rule 1 *must be supported by an affidavit* in Form 13 *verifying the facts on which the claim*, or the part of a claim, to which the application relates *is based and stating that in the deponent's belief there is no defence to that claim or part, as the case may be, or no defence except as to the amount of damages claimed*. (Emphasis added.)

[31] In *National Company For Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300; [1984] 1 CLJ Rep 283; [1984] 2 CLJ 200, the Federal Court held that in an application for summary judgment under O 14 the affidavit in support of the plaintiff's application must comply with the requirements of O 14 r 2, in that: (a) the deponent must verify the facts of the claim on which the application for summary judgment is based; and (b) the deponent must state his/her belief there is no defence to the claim.

[32] The Federal Court went on to hold that an affidavit is defective if the deponent of the affidavit omits to state the deponent's belief that there is no defence to the claim or part of the claim to which the application relates. It held that an application for summary judgment is not within O 14, if, among others, the affidavit in support of the application is defective. George Seah FCJ in delivering the judgment for the Federal Court said:

> We think it appropriate to remind ourselves once again that in every application under O 14 the first considerations are (a) whether the case comes within the Order and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding under O 14. For the purposes of an application under O 14 the preliminary requirements are:
>
> (i) the defendant must have entered an appearance;
>
> (ii) the statement of claim must have been served on the defendant; and

(iii) the affidavit in support of the application must comply with the requirements of r 2 of the O 14.

It is to be observed that a case is not within O 14: (a) where no statement of claim has been served on the defendant; (b) where the indorsement on the writ includes a claim or claims outside the scope of O 14 as coming within r 1(2); (c) *where the affidavit in support of the application is defective, eg in omitting to state the deponent's belief that there is no defence to the claim or part to which the application relates*; (d) where the application is made in an action against the Government [O 73 r 5(1)].

If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a prima facie case and he comes entitled to judgment. The burden then shifts to the defendant to satisfy the Court why judgment should not be given against him (see O 14 r 3 and 4(1)). (Emphasis added.)

(ii) General rules governing summary judgments

[33] The courts' judicial power to enter judgment summarily against a defendant without trial is an almost draconian power. Hence, why the law states that this judicial power can only be exercised where the defendant has no defence to the claim and it is to be exercised in accordance with the safeguards and procedures provided in the ROC. The rules in the ROC regulating summary judgments are O 14 r 1, where a plaintiff may only apply for summary judgment on the ground that a defendant has no defence to the claim; the application can only be made only after the statement of claim has been served on the defendant and the defendant has entered appearance; O 14 r 2, where the application for summary judgment must be supported by an affidavit where the deponent verifies the facts on which the claim is based and states his belief that there is no defence to the claim; and O 14 r 3, where the court may not give summary judgment for the plaintiff if the defendant satisfies the court that 'there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim'.

[34] It is settled law that where there are triable issues or there ought for some other reason to be a trial of the plaintiff's claim, the courts must dismiss the plaintiff's application for summary judgment against the defendant: see *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 1 CLJ Rep 14. Harminder Singh Dhaliwal JCA (as he then was) delivering the Court of Appeal's judgment in *ES HVAC Sdn Bhd v Miracle Asset Builder Sdn Bhd* [2019] 3 MLJ 485; [2019] 1 LNS 209, explained the general rule on summary judgment as follows:

[12] Now, the law with respect to summary judgment is fairly trite. The general rule is that a plaintiff must prove its case in a trial. The Order 14 jurisdiction is only to be exercised in very clear cases. The intention was not to shut out defendants from their day in court (see *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183; [1987] CLJ Rep 182; [1987] 1 CLJ 246). Even in the absence of a

statement of defence or affidavit, the application for summary judgment can be resisted by relying on the plaintiff's own documents (see *Noh Hyoung Seok v Perwira Affin Bank Bhd* [2004] 2 MLJ 203). In any event, the jurisprudence under Order 14 rule 3 of ROC 2012 is clear. *Even if the defendant was not able to point to a specific issue which ought to be tried, but nevertheless satisfied the court that there were circumstances that ought to be investigated, then the words 'there ought for some reason to be a trial' would be invoked* (see *United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor* [1999] 1 MLJ 657; [1999] 2 CLJ 151). (Emphasis added.)

(iii) Exception to normal rule for triable issues in summary judgment

[35] The exception to the general rule that a court may not give summary judgment for a plaintiff if the defendant succeeds in raising triable issues, is in proceedings brought by the government under s 106 of the ITA for recovery of tax due and payable.

[36] By reason of the provision in s 106(3) of the ITA, the normal rule of triable issues in summary judgments do not apply in proceedings by the government for recovery of tax due and payable: see the decisions of the Federal Court in *Sun Man Tobacco Co Ltd v Government of Malaysia* [1973] 2 MLJ 163; and the Supreme Court in *Chong Woo Yit v Government Of Malaysia* [1989] 1 MLJ 473; [1989] 1 CLJ Rep 9; [1989] 2 CLJ 87, where the Supreme Court agreed and approved the dicta of Arulanandom J in *Government of Malaysia v Abdul Rahman* [1975] 1 MLJ 276, that:

When proceedings are commenced under O 14 the normal rules for triable issues do not apply to cases of this nature because of the provisions of the Income Tax Act. Normally when the defence raises triable issues it is a rule of law that unconditional leave to defend should be given but under s 106(3) of the Income Tax Actit clearly states that in any proceedings commenced by the government under s 106(1) of the Act for the recovery of tax by civil proceedings as a debt due to the government the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under s 103(4) or (5) ...

[37] Section 106(3) of the ITA prohibits the courts from entertaining any plea by a defendant tax payer that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased. Section 106 of the ITA, prior to the amendment by the Finance Act 2019 reads as follows (sub-s 106(3) was amended by s 17 of the Finance Act 2019 (Act 823) where the words 'sub-s 103(1A), (3), (4), (5), (6), (7) or (8)' is substituted with the words 'sub-s 103(1A), (3), (5) or (7)'):

(1) Tax due and payable may be recovered by the Government by civil proceedings as a debt due to the Government.

...

(3) In any proceedings under this section the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under subsection 103(1A), (3), (4), (5), (6), (7) or (8).

[38] Although a court may not entertain triable issues raised by a defendant in an application for summary judgment for proceedings commenced by the government under s 106(1) of the ITA, this exception does not remove the fundamental requirement under O 14 r 1 of the ROC that a plaintiff must establish its claim. Therefore, the plaintiff government must provide sufficient evidence of the amount of tax claimed from the defendant tax payer and the application for the summary judgment must be made on the basis that the defendant has no defence to the claim. The plaintiff must also support its application with an affidavit stating the deponent's belief that the plaintiff is entitled to the claim and the defendant has no defence to the claim.

[39] The government must satisfy both requirements relating to the evidence of the claim and the affidavit in support, in order for its application for summary judgment to come under O 14 and for a court to enter summary judgment for the government against the defendant taxpayer for the amount of tax claimed. As held by the Federal Court in *National Company for Foreign Trade*:

> a case is not within O 14 ... (c) where the affidavit in support of the application is defective, eg in omitting to state the deponent's belief that there is no defence to the claim or part to which the application relates

[40] For applications by the government for summary judgment under O 14 r 1, pursuant to O 73 r 5(2) of the ROC the affidavit shall be sufficient if it states the deponent's belief that: (a) the applicant is entitled to the relief claimed; and (b) there is no defence to the claim or part of a claim to which the application relates or no defence except as to the amount of any damages claimed. O 73 r 5 (2) of the ROC reads as follows:

> 73 Proceedings by and against the Government
>
> 5 Summary judgment (O 73 r 5)
>
> ...
>
> (2) *Where an application is made by the Government under* Order 14, rule 1, Order 14, rule 5 or Order 81, rule 1, the affidavit required in support of the application may be made by —
>
> (a) the solicitor acting for the Government; or
>
> (b) an officer duly authorized by the solicitor so acting or by the department concerned,
>
> and *the affidavit shall be sufficient if it states that in the deponent's belief the applicant*

is entitled to the relief claimed and there is no defence to the claim or part of a claim to which the application relates or no defence except as to the amount of any damages claimed. (Emphasis added.)

[41] Accordingly, the government's application for summary judgment for civil suits under s 106 of the ITA must be on the grounds that defendant has no defence to the claim and the plaintiff must prove the amount of tax due and payable claimed.

(iv) Has the plaintiff provided sufficient evidence of the amount of tax claimed from the defendant?

[42] Pursuant to sub-s 142(1) of the ITA, the plaintiff discharges the burden of proving the amount of tax due and payable claimed from the defendant by producing a certificate signed by the DGIR giving the name and address of the defendant and the amount of tax due.

[43] Subsection 142(1) of the ITA states that in a suit under s 106 of the ITA, a certificate signed by the DGIR shall be sufficient evidence of the amount of tax due and shall be sufficient authority for the court to give judgment on that amount. This is in contrast to the provision in sub-s 142(2) that in any criminal or civil proceedings under ITA, any statement 'purporting to be signed' by the DGIR or an authorised officer, shall, until the contrary is proved, be evidence of any fact stated in that statement.

[44] Sub-sections 142(1) and (2) reads as follows:

142 Evidential Provisions

(1) *In a suit under section 106 the production of a certificate signed by the Director General* giving the name and address of the defendant and the amount of tax due from him *shall be sufficient evidence of the amount so due and sufficient authority for the court to give judgement for that amount*.

(2) *In criminal or civil proceedings under this Act any statement purporting to be signed by the Director General or an authorized officer* which forms part of or is annexed to the information, complaint or statement of claim, *shall, until the contrary is proved, be evidence of any fact stated therein*:

Provided that this subsection shall not apply to —

(a) a statement of the intent of the accused person or other defendant; or

(b) proceedings for an offence punishable by imprisonment. (Emphasis added.)

[45] In *Sun Man Tobacco Co Ltd v Government of Malaysia* [1973] 2 MLJ 163; and *Kerajaan Malaysia v Neraca Untung Sdn Bhd* [2009] MLJU 521;

A [2009] 1 LNS 575, the Federal Court and the Court of Appeal respectively held that in a suit brought under s 106 of the ITA, a certificate signed by the DGIR that the defendant was the person from whom that tax was due and if the certificate gave the amount of the tax to be due, then such a certificate 'shall be sufficient evidence of the amount so due and sufficient authority to give B judgment for that amount'.

[46] However, in this instant case, the copy of the certificate produced under sub-s 142(1) shown as exh 'AAD-7' in the plaintiff's affidavit was not signed by the DGIR but by Puan Zainun bt Ahmad, Ketua Penolong Pengarah, C Cawangan Guaman Kuala Lumpur.

[47] The Federal Court in *Kerajaan Malaysia v Dato' Hj Ghani Gilong* [1995] 2 MLJ 119; [1995] 3 CLJ 161, held that general words in s 136 of the ITA read together with s 7 of the Interpretation Act 1967 (Consolidated and D Revised 1989) permits the Acting Assistant Director General to sign and issue a certificate under s 142(1) of the ITA for and on behalf of the DGIR. Edgar Joseph Jr FCJ delivering the judgment for the Federal Court held as follows:

> ... in our view, the very general words of s 136 of the Act, read together with s 7 of E the Interpretation Act, 1967 (Consolidated and Revised 1989), are sufficient to permit an Acting Director General in the position of Puan Norlina bte. Zainal to sign and to issue a certificate under s 142(1) of the Act for and on behalf of the Director General.

F **[48]** Section 7 of the Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989) reads as follows:

> *7 Reference to office-holder includes acting holder etc*
>
> A reference to the holder of any public or other office (including a reference in an appointment made pursuant to section 50) is a reference to the person for the time G being lawfully holding, acting in or exercising the functions of that office.

[49] Section 136 of the ITA reads as follows:

> *136 Delegation of Director-General's Functions*
>
> H *(1) Any function of the Director General under this Act* (not being a function exercisable by statutory order or a function exercisable under section 152) *may be exercised by a Deputy Director General.*
>
> *(2) Any officer appointed under paragraphs 134(2)(b) and (c) may exercise any function of the Director General under this Act* (not being a function exercisable by statutory I order or a function exercisable under section 152) *except his function under* section 44, subsection 137(1) and section 150.
>
> ...
>
> (5) *The Director General may by writing under his hand authorize any public officer or any employee of the Inland Revenue Board of Malaysia* (subject to any exceptions or

limitations contained in the authorization) *to exercise or assist in exercising any function of the Director General under this Act which is exercisable under subsection (2) by the appointed officers*.

(6) Where a public officer or an employee of the Inland Revenue Board of Malaysia exercises any of the Director General's functions by virtue of any provision of subsections (1) to (5), he shall do so subject to the general supervision and control of the Director General.

(7) The delegation by or under any provision of subsections (1) to (5) of the exercise of any functions of the Director general shall not prevent the exercise of that function by the Director General himself.

(8) References in this Act to the Director General shall be construed, in relation to any case where a public officer or an employee of the Inland Revenue Board of Malaysia is authorized by any provision of subsection (1) to (5) to exercise the functions of the Director General, as including references to that officer or employee. (Emphasis added.)

[50] Subsection 134(2)(b) and (c) of the ITA states that the IRB shall after consulting the DGIR, appoint by notification in the *Gazette*:

(b) State Directors, Directors, Deputy Directors, Principal Assistant Directors and Assistant Directors of Inland Revenue;

(c) Head of Revenue Solicitor, Deputy Revenue Solicitors, Senior Revenue Counsels and Revenue Counsels;

[51] There is no evidence in any of the plaintiff's affidavits (*afidavit sokongan* plaintiff affirmed on 20 November 2019; *afidavit balasan* plaintiff affirmed on 26 December 2019; and *afidavit balasan* (2) plaintiff affirmed on 26 December 2019) that Puan Zainun bt Ahmad, is either an officer *gazetted* under sub-s 134(2)(b) or (2)(c) of the ITA; or was authorised by the DGIR 'by writing under his hand' pursuant to s 136(5) of the ITA to sign the said certificate on the DGIR's behalf.

[52] Therefore, because the certificate under s 142 of the ITA was not signed by the DGIR and there is no evidence that the person who signed it, Puan Zainun bt Ahmad, is either an officer *gazetted* to exercise any function of the DGIR under ITA pursuant to s 136(2) of the ITA, or was authorised by the DGIR 'in writing under his hand' pursuant to s 136(5) of the ITA to exercise or assist in exercising any function of the DGIR, the certificate shown as exh 'AAD-7' is not sufficient evidence of the amount tax due and payable by the defendant. It is also not sufficient authority for this court to give judgment for the amount stated on the certificate.

(v) Is the plaintiff's application for summary judgment made on the basis that the defendant has no defence to its claim?

[53] As held by the Federal Court in the *National Company for Foreign Trade* and as stipulated in O 73 r (5), for an application for summary judgment by the Government to fall within O 14 rule, the deponent of the plaintiff's affidavit in support, must state his belief that the plaintiff is entitled to the relief claimed and there is no defence to the claim.

[54] In the application in encl 8, the plaintiff's reason for applying for summary judgment is not that the defendant has no defence to its claim but that the defendant has no defence with merits ('defendan tiada pembelaan bermerit'). Additionally, the deponent of the plaintiff's affidavit in support, Puan Adrina bt Ahmad Dahlan, did not state her belief that there is no defence to the claim. Instead, she stated in para 25 of her affidavit in support that she is advised and truly believes that the defendant 'has no defence with merits'. Paragraph 25 of her affidavit in support is reproduced below:

> 25. Seterusnya saya telah dinasihatkan dan sesungguhnya mempercayai bahawa *Defendan tidak ada pembelaan bermerit* di dalam tuntutan ini dan Plaintif berhak mendapatkan relif yang dituntut. (Emphasis added.)

[55] As discussed above, the general rule of summary judgments is that judgments can only be entered summarily where there is a 'no defence' to a plaintiff's claim. The plaintiff's application must be supported with an affidavit stating to the deponent's belief that there is 'no defence' to the claim. Judgments can be entered summarily against a defendant without trial if the court is satisfied that the defendant has no defence to the plaintiff's claim and does not raise any triable issues.

[56] The exception to the general rule is that a defendant may not raise triable issues in summary judgment applications for proceedings by the government for recovery of tax due under s 106(1) of the ITA.

[57] However, the summary judgment rules regarding evidence of amount claim and 'no defence' still applies. Therefore, government must provide sufficient evidence of the amount tax claimed and that the deponent of the affidavit in support of the government's application for summary judgment must state his belief verifying the facts on which the claim is based and that the defendant has no defence to the claim.

[58] As opposed to trials where evidence is tendered through witnesses who can be examined and cross-examined, the courts have to decide a plaintiff's application for summary judgment by way of affidavit evidence only. It is settled law that in a hearing by way of affidavit evidence, it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavits: see Mohd Azmi SCJ in *Bank Negara Malaysia v Mohd Ismail Ali Johor & Ors* and Lord Diplock in the Privy Council decision in *Eng Mee Yong & Ors v Letchumanan*

[1979] 2 MLJ 212. Additionally, it is settled law, when dealing with conflicting affidavit evidence, a court can only consider evidence that is undisputed or uncontroverted: see Lord Templeman's dicta in the Privy Council case of *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433; [1987] 1 WLR 413 setting out the principles as regards affidavit evidence, which principles were applied by the Court of Appeal in *Diana Clarice Chan Chiing Hwa v Tiong Chiong Hoo* [2002] 2 MLJ 97; [2002] 1 CLJ 721; [2002] 2 AMR 1527.

[59] In this instant case, the natural and ordinary meaning in the plaintiff's application for summary judgment and the deponent's averment that the defendant 'has no defence with merits' is that the defendant has a defence but the defence is without merits. Therefore, there is a conflict of evidence on the plaintiff's affidavit in support with the defendant's affidavit in reply. The plaintiff says that the defendant's defence is without merits, whereas the defendant says that her defence is with merits because the tax assessments are without basis, grossly inaccurate and time barred for YA 2011 and YA 2013.

[60] Whether a defendant's defence is with or without merits, is a question that ought to be decided at trial, and cannot be decided summarily. As established in *Sun Man Tobacco Co Ltd v Government of Malaysia*; *Chong Woo Yit v Government of Malaysia*; and *Government of Malaysia v Abdul Rahman* [1975] 1 MLJ 276, the normal rules of triable issues do not apply to the government's application for summary judgment for proceedings under s 106 of the ITA.

[61] Therefore, by stating that the defendant has no defence with merits, the plaintiff is raising triable issues which this court is not allowed to consider under O 14 and which do not apply to summary judgment applications by the government for claims of tax due by virtue of s 106(3) of the ITA.

[62] Moreover, the deponent's failure to aver her belief that the defendant has no defence to the plaintiff's claim renders the affidavit defective since it is contrary to the express requirements of O 14 r 2. As held by the Federal Court in *National Company for Foreign Trade* the failure of a deponent of an affidavit in support of an application for summary judgment under O 14 to state his belief the defendant has no defence to the plaintiff's claim, makes the affidavit defective. Additionally, pursuant to O 73 r 5(2), the deponent's failure to state that the defendant has no defence makes the affidavit insufficient to support the government's application for summary judgment under O 14 r 1.

E. DECISION ON THE PLAINTIFF'S APPLICATION FOR SUMMARY JUDGMENT

[63] Accordingly, this court is unable to grant the plaintiff summary judgment for its claim for tax due and payable for YAs 2011 to 2017 against the defendant for the following reasons:

(a) first, the plaintiff did not provide sufficient evidence to prove the amount of tax due and payable claimed from the defendant in this suit. The certificate exhibited in the plaintiff's affidavit in support is not sufficient evidence of the amount of tax due and payable by the defendant. It is also not sufficient authority for this court to give judgment for the amount stated on the certificate under s 142(1) of the ITA because: (a) the certificate was not signed by the DGIR as required by s 142(1) of the ITA; and (b) there is no evidence that Puan Zainun bt Ahmad, Ketua Penolong Pengarah, Cawangan Guaman Kuala Lumpur, who signed the certificate was an officer *gazetted* to exercise any function of the DGIR under ITA under s 136(2) of the ITA, or was authorised by the DGIR 'in writing under his hand' under s 136(5) of the ITA to exercise or assist in exercising the DGIR's function of signing the certificate; and

(b) secondly, the plaintiff failed to establish a prima facie case that the defendant has no defence to its claim as the plaintiff's application for summary judgement is not made on the ground that the defendant has no defence as required under O 14 r 1. Additionally, the deponent of the plaintiff's affidavit in support of its application did not state her belief that there is no defence to the plaintiff's claim, as required under O 14 r 2 and O 73 r 5(2) of the ROC.

[64] Therefore, the plaintiff's application for summary judgment for its claim against the defendant for tax due and payable for YAs 2011 to 2017 is dismissed.

[65] I must make it clear that this court's decision to dismiss the plaintiff's application for summary judgment in encl 8 is not a decision on the merits of the plaintiff's claim for the tax due and payable by the defendant for the YAs 2011 to 2017. Nor is it a decision on the merits of defendant's defence.

[66] The defendant has appealed against the tax assessments and the IRB has forwarded her appeal to the Special Commissioner for Income Tax. Accordingly, the veracity of the tax assessments and the merits of defendant's defence are questions of facts to be determined by the Special Commissioners of Income Tax at the hearing of the defendant's appeal before them.

[67] There shall be no order as to costs.

Order accordingly.

Reported by Nabilah Syahida Abdullah Salleh